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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 404

PAN AMERICAN FIRE & CASUALTY COMPANY,
Petitioner,

VERSUS

RAYMOND PENDLETON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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August, 1963.

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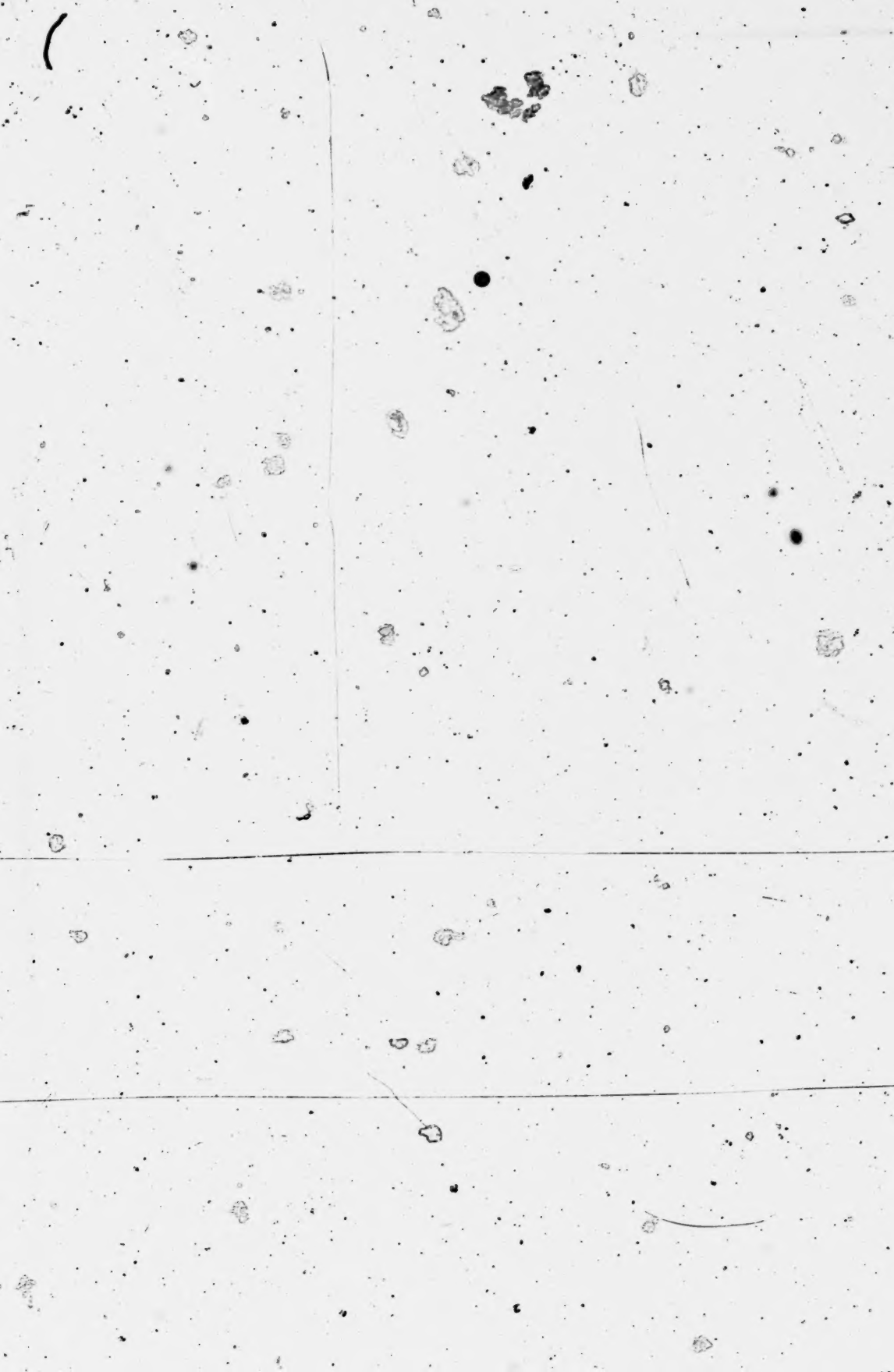

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In the

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No. .....

PAN AMERICAN FIRE & CASUALTY COMPANY,
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RAYMOND PENDLETON,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled case on May 16, 1963.

CITATION TO OPINION BELOW

The United States District Court for the District of New Mexico gave judgment in favor of petitioner, defendant below, without opinion. That court's findings of fact, conclusions of law and judgment are unreported but are in the record (pp. 14-15), and are reproduced herein as Appendix A (pp. i-iii). The opinion of the United States

Court of Appeals for the Tenth Circuit is reported in 317 F.2d 96 and reproduced herein as Appendix B (pp. v-xiii) hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on May 16, 1963, Appendix B (pp. xiii). Rehearing was denied on July 16, 1963, Appendix H (p. xvi). Time to file petition for rehearing was extended to June 27, 1963, by two orders, Appendix C (p. xiii-xiv). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether, consistently with the due process provisions of the Fifth Amendment, the Court of Appeals may write a contract of insurance for the parties, creating coverage where it recognizes none previously existed, upon the basis of estoppel, there being no claim or issue of fraud or right of reformation.

2. Does not the protection of property rights guaranteed by the Due Process Clause of the Fifth Amendment protect a person from having a contract made for him by judicial fiat, as much as it prohibits legislative interference with existing contracts; and is not the decision of the Court of Appeals an unreasonable and arbitrary interference with petitioner's contractual rights and in conflict with the decisions on the same question of other Courts of Appeals?

3. Whether the Court of Appeals has decided an important state question in conflict with the applicable New Mexico law by its holding creating new coverage on the

basis of estoppel where insured was recognized by the court to have had equal knowledge with the insured of the facts giving rise to the asserted estoppel, the Court of Appeals presuming prejudice.

4. Whether the Court of Appeals may refuse to apply the provisions of Rule 52(a) of the Federal Rules of Civil Procedure by pronouncing the trial court's findings as "ultimate facts" and "conclusions of law"; and by the casual catch-all statement that any finding "by the trial court which is inconsistent with the basic facts set forth herein are clearly erroneous," without any specification or reasons.*

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The issues in the instant case involve Amendment V of the Constitution of the United States (Appendix D, p. xiv), and Rule 52 of the Federal Rules of Civil Procedure (Appendix F, p. xv).

STATEMENT OF THE CASE

Respondent, hereinafter called Pendleton, conducted two separate businesses in New Mexico: (1) The Springer Gas Company, a corporation (which he owned outright), a public utility which distributes liquefied petroleum gas to customers in Springer, New Mexico from tanks by way of a pipeline distribution system; (2) a gas dealership which Pendleton conducted as an individual under the trade name of Pendleton Oil Company, and in that business he sold gas to private users, to Springer Gas Company, and he installed appliances and equipment for gas consumers.

* For an elaboration and clarification of Question 4, see Addendum following the Appendix.

Petitioner, hereinafter called Pan American, wrote two ability insurance policies covering both the corporation nd Pendleton's individual operations: (1) A policy in the mount of $25,000.00 covering the Springer Gas Company's ublic utility distribution system (the maximum amount which he could obtain on such an operation, Tr. p. 63); nd (2) the policy in question here in the amount of 300,000.00 covering Pendleton's individual operations as private gas dealer, and which policy, as recognized by he Court of Appeals, excluded the hazards covered by he $25,000.00 policy, under the exclusion clause reading (Tr. p. 125):

"It is understood that the following operations are excluded under this policy:

"Gas Distributing—Liquefied Petroleum Gas—All operations in connection with local distribution by gas mains or piping from central tanks to ultimate consumers, including maintenance, meter readers, and installation, servicing and repair of liquefied petroleum gas systems, piping and customers' equipment and all other operations usual and incidental to the operation of a Liquefied Petroleum Pipeline Operation."

While these policies were in force, a gas explosion occurred in the town of Springer, served by Springer Gas Company public utility, which resulted in two deaths and extensive personal injuries and property damage as a result (according to the state court judgment) of a leak in the gas utility's distribution system. However, in the amended petition in the state court, negligence was charged against Pendleton individually, in installing liquefied petroleum gas appliances and equipment in the consumers' properties where the explosion occurred, and which allegations Pan

merican's counsel felt obligated Pan American to defend
he action against Pendleton. The Court of Appeals held
his was an erroneous belief.

An attorney friend of Pendleton's in Albuquerque, Mr.
at Sneehan, referred Pendleton to Mr. Carl Gilbert, a
rominent attorney in Santa Fe, and Pendleton employed
im (Tr. p. 61). Gilbert studied the policies and advised
endleton of his coverage and thoroughly explained the
xclusion clause which Pendleton understood (Tr. p. 62).

Prior to any suit being filed, Gilbert contacted Pan
merican, informed it of his representation of Pendleton
nd asked for reports of investigation of the explosion, con-
ucted by Pan American. During these discussions, Pan
merican asked Gilbert to also represent it in the defense
f the claims. With Pendleton's approval, Gilbert agreed
o do so.

Suits were filed in the state court against the corporate
ublic utility, Springer Gas Company, and Pan American
hrough Gilbert, undertook their defense as required in
he $25,000.00 gas utility policy. After depositions were
aken, the pleadings were amended to allege negligence
n the part of Pendelton, doing business as Pendleton Oil
Company, in overfilling the tanks with gas and in im-
roperly installing appliances and equipment in the build-
ng where the explosions occurred. These allegations re-
quired that Pan American defend Pendleton under its $300,
000.00 policy, which it did.

Pan American hired Mr. Fletcher Catron of Santa Fe to represent Pendleton individually.[1] Gilbert and Catron represented Pendelton to his entire satisfaction throughout the remainder of the suit (Tr. p. 73). Because the allegations of the amended complaint obligated Pan American to defend Pendleton, no reservation of rights or nonwaiver agreement was executed by Pan American (Tr. p. 91).

In the course of the state court trial, the plaintiffs failed to prove their allegations of negligence on the part of Pendleton, doing business as Pendleton Oil Company (Tr. p. 74), but did show Pendleton to be liable on the theory that Springer Gas Company was his alter ego. The plaintiffs asked and received leave to amend their pleadings to conform to the proof and allege this theory of recovery.

During the course of the trial, an opportunity arose to settle the cases for a total of $151,000.00. This settlement was made with Pendleton's whole-hearted approval (Tr. p. 72).

The state court made findings of fact that the only negligence shown was that of Springer Gas Company in failing to find a leak in its lines and that there was no negligence on the part of Pendelton, doing business as Pendleton Oil Company (Tr. pp. 166-168). Pendleton agreed that this finding was in accord with the evidence (Tr. p. 74).

Pursuant to the state court judgment, Pan American paid the $25,000.00 required by its policy covering Springer

[1] Gilbert explained to Pendleton that since he was already appearing for Springer Gas Company for trial practical reasons it was better for another lawyer to appear for him individually, and Mr Catron was employed by Pan American for that purpose, but that he, Gilbert, would continue to look after Pendleton's interests as Pendleton's personal lawyer in the litigation.

Gas Company; and Pendleton paid the balance of $126,000.00.[2] Respondent then commenced this diversity suit for damages he had paid, Pendleton being a citizen of New Mexico, and Pan American a citizen of Texas with its principal place of business at Houston therein.

DISPOSITION OF THE DISTRICT COURT

This case was tried without a jury in the United States District Court for the District of New Mexico. After hearing all the evidence, Judge Waldo H. Rogers decided in favor of Pan American. He made findings of fact and conclusions of law in support of his judgement (Appendix A, pp. i-iii).

DISPOSITION IN THE COURT OF APPEALS

Pendleton appealed from the District Court's judgment to the United States Court of Appeals for the Tenth Circuit. In an opinion by Judge Hill, the Court of Appeals reversed the trial court and remanded with directions to enter judgment as a matter of law in favor of Pendleton. Pan American sought a rehearing,[3] but this was denied (Appendix H, p. xvi).

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[2] It is important to note that Pendleton was held personally liable for Springer Gas Company's negligence as the alter ego of the corporation (covered by the $25,000.00 policy) and not by virtue of his individual negligence as a gas dealer (covered by the $300,000.00 subject policy).

[3] This rehearing petition, compared with the Circuit Court's opinion, will demonstrate that 50 per cent of the opinion is irrelevant surplusage to the decision, evidently as an atmosphere of "justice" to justify the decision. This makes bad law.

REASONS FOR GRANTING THE WRIT

This petition should be granted in order to:

1. Correct the Court of Appeals' erroneous decision on a federal question in conflict with the decisions of this Court; and to protect the rights under the Fifth Amendment of litigants in the Federal Courts against judicial writing of contracts for parties that they did not themselves make, as the Court of Appeals has here done; in violation of petitioner's constitutional freedom to contract.

2. Resolve a conflict among the Courts of Appeals concerning whether the coverage of a contract of insurance may be created or extended by estoppel.

3. Correct the conflict between the Court of Appeals herein and the Supreme Court of New Mexico which arises because of the failure of the Court of Appeals to follow the decisions of the Supreme Court of New Mexico that prejudice is not presumed but a party must prove prejudice to establish estoppel which cannot arise where the parties have had equal knowledge of the facts giving rise to the assertion of estoppel.

4. Direct that the Courts of Appeals cannot emasculate Rule 52(a) of the Federal Rules of Civil Procedure, protecting the force of trial court fact findings by treating them as "ultimate facts and conclusions of law," as has the Tenth Circuit Court of Appeals herein.

ARGUMENT

Point I.

The Court of Appeals violated petitioner's right to contract protected by the Due Process Clause of the Fifth Amendment, by writing insurance coverage for which the parties did not contract, and in creating insurance coverage against which petitioner specifically contracted.

It is fundamental law "that the right to contract about one's own affairs is a part of the liberty of the individual protected by this clause, is settled by the decisions of this court, and is no longer open to question." *Adkins* v. *Children's Hospital*, 261 U.S. 525, 67 L. Ed. 785, at 791.

Furthermore, this Court has said:

> "It is everywhere recognized that the freedom of the people to enter into and carry out contracts in respect of their property and private affairs is a matter of great public concern and that such liberty may not lightly be impaired." *Highland* v. *Russell Car & Snow Plow Company*, 279 U.S. 253, 73 L. Ed. 688, at 691.

"This right is protected by the due process clause of the Fifth and Fourteenth Amendments." (*Ibid*)

This protection is against arbitrary and unreasonable interference with contract rights. It is manifest that the Court of Appeals has violated this right of liberty and of contract, and its actions are so unreasonable as to contravene the due process clause.

This is evidenced by the refusal of various Circuits to make a contract of coverage for the parties by judicial

decision that the parties themselves did not make in the insurance contract which they entered into. This is distinguished from an insurance company being estopped from asserting the right of forfeiture under policy provisions. This is also distinguished from an insurance company being estopped to assert or waive breaches of policy conditions. What we are concerned with here is creation of coverage that never existed in the policy.

This distinction is well recognized by the Fifth Circuit which refused to make such a contract as the Tenth Circuit has done, saying in *C. E. Carnes & Company* v. *Employers Liability Assurance Corporation* (5th Cir.), 101 F.2d 739, at 742:

> "The rule is that while an insurer may be estopped by its conduct or its knowledge from insisting upon a forfeiture of a policy, the coverage or restrictions on the coverage cannot be extended by the doctrine of waiver or estoppel . . .
>
> "The doctrine of waiver cannot be invoked to create a primary liability, and bring within the coverage of the policy risks not included or contemplated by its terms."

That such a decision is arbitrary and unreasonable is shown by the fact that it runs contrary to the well nigh universal rule to the contrary in state and federal courts: "Insurance coverage may not be created or extended by estoppel."[4]

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[4] *C. E. Carnes & Co., Inc., et al.* v. *Employers Liability Assurance Corporation*, 101 F.2d 739 (5th Cir., 1939); *Standard Accident Ins. Co.* v. *Roberts*, 132 F.2d 794 (8th Cir., 1943); *Fidelity & Guaranty Fire Corporation* v. *Bilquist*, 99 F.2d 533 (9th Cir., 1938); *Equitable*

As one example, attention is called to *Standard Accident Insurance Company* v. *Roberts*, 132 F.2d 794 (8th Cir., 1943). The Court was faced with a fact situation almost identical to that found in the case at bar. There the insurer had undertaken the defense of an action on behalf of the insured and the insured contended that the insurer was thereby estopped to deny coverage. There, as here, coverage was excluded by a specific provision. The Court of Appeals reversed a District Court decision in favor of the insured to hold. 132 F.2d 794, 798:

> ". . . The doctrine of waiver and estoppel cannot be asserted to extend coverage under a contract in which it was excluded by specific language . . ."

The Court there distinguished this rule from that in other insurance cases which permitted waiver or estoppel to result in liability against an insurer. The Court there said that waiver or estoppel may be permitted to prevent a forfeiture of the policy for failure of the insured to perform or fulfill an obligation under the policy, but will never

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[4] (Continued)
Life Assurance Society v. *Langford*, 234 Ala. 681, 176 So. 609; *Hartford Fire Ins. Co.* v. *Smith*, 200 Ark. 508, 139 S.W.2d 411; *Quillian* v. *Equitable Life Assurance Society*, 6 S.E.2d 108; *Kentucky Central Life & Accident Ins. Co.* v. *White*, 106 Ind. App. 530, 19 N.E.2d 872; *Pierce* v. *Homesteaders Life Ass'n.*, 223 Iowa 211, 272 N.W. 543; *Palumbo* v. *Metropolitan Life Ins. Co.*, 293 Mass. 35, 199 N.E. 335; *Malone* v. *American Fraternal Union*, 216 Minn. 303, 12 N.W.2d 615; *Schichman* v. *Commercial Travelers Mut'l Accident Ass'n*, 38 N.Y.S.2d 69, *aff'd*, 46 N.Y.S.2d 32, *app. den.* 47 N.Y.S.2d 486; *Antone* v. *New Amsterdam Casualty Co.*, 335 Pa. 134, 6 A.2d 566; *Washington Nat. Ins. Co.* v. *Craddock*, 130 Tex. 251, 109 S.W.2d 165; *Carew, Shaw & Pernasconi* v. *General Casualty Co. of America*, 189 Wash. 329, 65 P.2d 689; *Maryland Casualty Co.* v. *Industrial Comm.*, 230 Wis. 363, 284 N.W. 36.

be permitted to create coverage or extend coverage to a situation not already covered in the policy.

The unreasonable and arbitrary character of the abridgment of the right of contract in the case at bar is brought into stark focus by the Tenth Circuit's previously espousing the rule above stated. Thus, in *State Farm Mutual Automobile Insurance Company* v. *Petsch*, 261 F.2d 331, 335 (10th Cir., 1958), that Court said:

> ". . . This court has held in United Pac. Ins. Co. v. Northwestern Nat. Ins. Co., 10 Cir., 185 F.2d 443, 447, that the coverage of an insurance policy may not be extended by waiver or estoppel. This is in accord with general law . . ."

Unfortunately, we are unable to determine precisely what compelled the Court of Appeals to depart from what it states to be the "general law" and reach such a harsh and unusual result as the Court did not see fit to distinguish or refer to these earlier cases.

In addition to the holding of the Circuits referred to and the States cited previously, refusing to create a contract of coverage that the parties did not enter into by estoppel (where there is no fraud or effort at reformation), there certainly is no authority in the State of New Mexico, where this case was tried, for the decision of the Court of Appeals. There is nothing there to indicate that the Supreme Court of that State has ever undertaken to hold, as the Court of Appeals has here held, in violation of the due process clause on insurance contracts. Indeed, as

shown under our next point, the decisions of the New Mexico Court have been contravened.

Point II.

The decision of the Court of Appeals for the Tenth Circuit herein is in conflict with decisions of the highest state court in New Mexico in that the court presumes prejudice in applying estoppel where no prejudice was shown to the insured and it was recognized the insured had equal knowledge with the insurer, of the facts relating to coverage.

The trial court, which heard the evidence in this case, found (Appendix A, p. 1, Tr. p. 14):

> "That at all times material hereto the plaintiff was aware of the fact that the distribution of gas was not covered by the policy which has been marked 'Plaintiff's Exhibit A' and any damage or injury therefrom was excluded."

The Court further found that the plaintiff had not been "misled or misinformed by the defendant or its agents concerning the terms and conditions of the policy, Plaintiff's Exhibit, "A"; and that there had been no acts of estoppel or waiver on the part of Pan American.

But the Court of Appeals held that: (1) the insurer's conduct would serve to estop insurer from asserting non-coverage even if the insured had equal knowledge with the insurer of the facts relating to coverage (317 F.2d 96, 101); and (2) that no prejudice to the insured need be shown to estop the insurer (317 F.2d 96, 99).

Since the findings of the District Court sitting without a jury are binding on the Court of Appeals unless found to

be "clearly erroneous" (F. R. C. P. 52a), these holdings are essential to the decision of the Court of Appeals. Both are in direct conflict with applicable decisions of the Supreme Court of New Mexico.

In *Porter v. Butte Farmers Mutual Insurance Company*, 360 P.2d 372 (N.M., 1961), the insureds contended that (1) because they were not aware of the expiration date of their policies, although such dates were written in the policies, and (2) becaues the insurer undertook to investigate the claim, the insurer was estopped to deny coverage. The Court held (1) that the insured has a duty to read his policy and will be presumed to be familiar with its contents, and (2) that there can be no estoppel in the absence of reliance and injury on the part of the person seeking to assert the estoppel.

Similarly, in *Patten v. Santa Fe National Life Ins. Co.*, 139 P.2d 1019 (N.M., 1943), the beneficiary of a life insurance policy contended the insurer was estopped by its past conduct to deny liability on the theory that the insured had been misled into believing that an application for an extension of time in which to pay the premium had the effect of paying or deferring the premium. The Court said that if the insured had read his correspondence with the insurance company he would have known that the insurance was not in force. The Court then held that no estoppel will result where the party seeking to assert the estoppel had available the means of informing himself of the true facts. It should be noted that the District Court found and respondent admitted that he had had the policy

containing the exclusion clause in his possession for several months prior to the loss.

In view of the flagrant failure of the Court of Appeals to follow the New Mexico law as set forth above, it is submitted that certiorari should be granted to review the situation.

This Court has stated in various cases, among them *West v. American Telephone & Telegraph Company*, 311 U.S. 233, 237, 61 S. Ct. 179, 85 L. Ed. 139, 132 A.L.R. 956, that:

> "It is the duty of the former (federal courts) in every case to ascertain from all the available data what the state law is and apply it."

The Court of Appeals in its decision has failed to comply with this mandate.

Point III.

The United States Court of Appeals for the Tenth Circuit emasculated Rule 52a of the Federal Rules of Civil Procedure when it set aside the findings of fact of the District Court which were not clearly erroneous, on the primary ground that they were "ultimate facts or bare conclusions."

The District Court, after hearing extensive testimony of various witnesses, covering more than one hundred pages of the printed record (Tr. pp. 18-120), made extensive findings of fact (Tr. pp. 14-15). The Court of Appeals, after stating the facts as contended for by Pendleton and rejected by the trial court, summarized the findings and disposed of them with one sentence (317 F.2d 96, 99):

> "It must be observed that these findings are, in the final analysis, either findings of ultimate facts, without supporting findings of basic facts, or conclusions of law . . ."

But the Court adds for good measure that these are "clearly erroneous"—a conclusion in itself.

Such treatment does not do substantial justice to the applicable rule found in F. R. C. P. 52(a):

> ". . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses . . ."

This Court has recognized, in its last decision that it took jurisdiction of to consider the application of Rule 52(a), by a Circuit Court, *United States* v. *Yellow Cab Company*, 338 U.S. 338; 70 S. Ct. 177; 94 L. Ed. 150, as epitomized in the third paragraph of the Supreme Court Reporter syllabus, that:

> "Supreme Court must on appeal correct clear error even in findings of fact. Federal Rules of Civil Procedure, Rule 52, 28 U. S. C. A."

The Court said in the body of the opinion:

> "While of course it would be our duty to correct clear error even in findings of fact, . . . where a choice between two permissible views of the weight of evidence is not clearly erroneous."

What has happened here is apparent. The Circuit Court simply felt that, sitting in the trial court's position, they would have held the other way, so the Court has

undertaken to operate *de novo* to the emasculation of Rule 52(a) and in violation of the decisions of this Court in the *Yellow Cab* case, *supra*, and in *United States v. United States Gypsum Company*, 333 U.S. 364, 68 S. Ct. 525, 92 L. Ed. 746.

Furthermore, here the Court has reversed and rendered the case rather than remanding it with instructions to the trial court to make more detailed findings on the evidence instead of the so-called bare conclusions, or, if necessary, to take further evidence on the point the Court of Appeals deems of such importance.

With regard to the accuracy of the District Court findings, the Court of Appeals expressed no opinion, preferring to comment adversely on the brevity and conciseness of the findings. A preference has been expressed for "brief and pertinent findings of contested matters . . . rather than the delayed, argumentative, over-detailed documents prepared by winning counsel." *U. S. v. Forness, et al.*, 125 F.2d 928, 942 (2nd Cir., 1942), cited with approval *U. S. v. Crescent Amusement Co.*, 323 U.S. 173, 185, 65 S. Ct. 254, 89 L. Ed. 160, 168 (1944).

The ruthless disregard for the findings of fact demonstrated by the Court of Appeals here becomes shocking when considered in the light of the evidence. Since the critical issue was that of estoppel by reason of the insurer's defense of the suit, much of the testimony given was that of counsel who tried the state court damage suit. No doubt the local trial court was acquainted with these able and

experienced local counsel and hence was in a better position to weigh their testimony than was the Court of Appeals.

It is apparent that the Court of Appeals saw fit to reject the testimony of these witnesses and accept instead that of Pendleton. For example, the Court of Appeals states that the attorney Pendleton hired to represent him was recommended by an agent of Pan American (317 F.2d 96, 98). The attorney testified that Pendleton was referred to him by Pendleton's attorney, Mr. Pat Sheehan of Albuquerque, New Mexico (Tr. p. 61).

The Court of Appeals further stated (317 F.2d 96, 98) that some doubt existed until "the eve of the state court trial" concerning the coverage provided by the policy in question. The testimony of Pendleton's attorney (Tr. pp. 60-118) shows to the contrary that the coverage was clearly understood and, in fact, explained to and understood by Pendleton long prior to the time any suit was filed (Tr. p. 62).

This treatment of the District Court's findings of fact has been uniformly rejected in the other Circuits.

This process engaged in by the Court of Appeals of rejecting out of hand the fact determinations of the trial court and making its own determination of the facts is precisely the situation Rule 52(a) is intended to correct. It is submitted that the Court should grant certiorari to correct the erroneous interpretation of Rule 52(a) to pre-

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U. S. Foreman Co. v. Great Lakes Pipe Line Co., 274 F.2d 91 (8th Cir. 1960); Lamborn v. U. S., 268 F.2d 426 (8th Cir. 1959); Rice Corp. v. L. M. Rosenthal Jewelry Co., 161 F.2d 902 (D.C. Cir. 1947).

vent its complete emasculation, and the growth of the trend in Courts of Appeal to substitute their judgment *de novo* on the facts for that of the trial judge.

CONCLUSION

The petition for certiorari ought to be granted.

Respectfully submitted,

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Oklahoma City, Oklahoma,
Attorney for Petitioner.

August, 1963.

APPENDIX

APPENDIX A

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. That the court has jurisdiction over this cause.

2. That the defendant is a corporation duly organized and existing under the laws of the State of Texas, and admitted to do business in the State of New Mexico.

3. That at all times material hereto the plaintiff was aware of the fact that the distribution of gas was not covered by the policy which has been marked "Plaintiff's Exhibit A" and any damage or injury therefrom was excluded.

4. That the explosion and injuries resulting therefrom which happened in Springer, New Mexico, were caused by a defect in the distribution system of the Springer Gas Co. and that the plaintiff was not covered for such damages by the policy in question and that it was never intended that damages arising from the distribution system were to be covered by the policy described as "Plaintiff's Exhibit A."

5. That the said policy in question had been in the possession of the insureds for several months prior to the time of the explosion and resulting damage and it was the duty of the said insureds to have read the policy and become acquainted with the terms therein.

6. That at all times material hereto the insureds, specifically including Ray Pendleton, were aware of the fact that there was a policy of insurance with the defendant for $25,000.00 coverage, and no more, on the gas distribution

system of the Springer Gas Co., Inc., and that the allied businesses corporations and partnerships, were not covered on gas distribution by the policy designated as "Plaintiff's Exhibit A."

7. That at all times material hereto the only policy covering damages or claims from the gas distribution system was the policy introduced and marked "Plaintiff's Exhibit B," which has an aggregate coverage of $25,000 and that all sums due under such policy have heretofore been paid by defendant, in connection with the Springer explosion and resulting damages.

8. That at all times material hereto Springer Gas Co., Inc., was a public utility and such Company owned the distribution system and was engaged in the distribution of liquefied petroleum in Springer, New Mexico.

9. That there have been no acts committed or performed on the part of the defendant that would be a waiver or an estoppel.

10. That neither the plaintiff nor any of the insureds have ever been misled or misinformed by the defendant or its agents concerning the terms and conditions of the policy, Plaintiff's Exhibit "A."

CONCLUSIONS OF LAW

1. That no estoppel has been shown against the defendant.

2. That no waiver has been shown against the defendant.

3. That the plaintiff has failed to sustain the burden of proof and therefore cannot recover in this cause.

4. That the policy in question did not cover against damages or claims arising from faults in the gas distribution system.

5. That the policy in question specifically excluded coverage in connection with gas distribution.

6. That this cause must be dismissed.

Waldo H. Rogers
District Judge

All other findings of fact and conclusions of law heretofore requested by the parties, not included herein, are refused.

Waldo H. Rogers
District Judge

Filed June 11, 1962

JUDGMENT

This cause coming on before the court, this time on trial for its merits, and the court having heard the evidence and the argument of counsel, being sufficiently advised in the premises, Finds the issues in favor of the defendant and against the plaintiff.

It is, Therefore, Ordered, Adjudged And Decreed: That this cause be and the same is hereby dismissed.

Waldo H. Rogers
United States District Judge

Filed June 11, 1962

APPENDIX B

FILED
United States Court of Appeals
Tenth Circuit
MAY 16 1963
Robert B. Cartwright,
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

March, 1963, Term

RAYMOND PENDLETON, Appellant,
vs. Number 7126
PAN AMERICAN FIRE AND CASUALTY COMPANY, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

Frank Andrews of Seth, Montgomery, Federici & Andrews for Appellant;

A. H. McLeod (W. A. Keleher and Russell Moore were with him on the brief) for Appellee.

Before MURRAH, Chief Judge, BREITENSTEIN and HILL, Circuit Judges.

HILL, Circuit Judge.

Appellant, Pendleton, commenced this diversity suit in the lower court against appellee, Pan American Fire and Casualty Company to recover upon a comprehensive liability insurance policy. Trial was had to the court, without

a jury, and resulted in a judgment adverse to Pendleton. This appeal is from that judgment.

At the date of the issuance of the policy in question by appellee to appellant, he was doing business at Springer, New Mexico, personally as the Pendleton Oil Company and also through a corporation, Cactus Butane Company, Inc. Cactus Butane owned the gas distribution system in Springer and metered gas to its retail customers. Pendleton Oil furnished the liquefied petroleum gas to Cactus Butane for distribution to its customers. During the term of the policy the Springer Gas Company, Inc., a corporation, became the successor to Cactus Butane. The policy was issued July 24, 1956, to Pendleton Oil Company, Cactus Butane Company, Inc., and Arthur A. Kersh, doing business as Kersh Mercantile, with Springer Gas being thereafter substituted for Cactus Butane. It was the ordinary comprehensive liability type policy providing limits of coverage for bodily injuries of $100,000 for each person and $300,000 for each accident together with $50,000 property damage for each accident. This policy contained an endorsement[1] pur-

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[1] "It is understood that the following operations are excluded under this policy:

Gas distributing—liquefied petroleum gas—all operations in connection with local distribution by gas mains or piping from central tanks to ultimate consumers, including maintenance, meter readers, and installation, servicing and repair of liquefied petroleum gas systems, piping and customers' equipment and all other operations usual and incidental to the operation of a Liquefied Petroleum Pipeline Operation.

* * * * * *

"Endorsement for Liquefied Petroleum Gas Licensee Policy of Insurance Filed With the New Mexico Liquefied Petroleum Gas Commission Under Chapter 97 of the 1955 Session Laws

(1) The policy to which this endorsement is attached is hereby amended to assure compliance by the Insured and the Insuring Company with Chapter 97 of the New Mexico 1955 Session Laws and the pertinent Rules and Regulations of the New Mexico Liquefied Petroleum Gas Commission."

porting to exclude coverage for the distribution of liquefied petroleum gas. A second comprehensive liability policy of insurance was issued at the same time by appellee, naming Cactus Butane as the insured, with Springer Gas being later substituted as a named insured, with top limits of $25,000. The Springer Gas Company has assigned to Pendleton all of its rights under both policies of insurance.

During the terms of the two policies and on November 25, 1956, an explosion occurred on the premises of one of the gas distribution system's customers resulting in the death of two persons, the injury of others and extensive property damage. Soon after the explosion, Pendleton took the two insurance policies to appellee's state agent and discussed the explosion with him. The agent referred Pendleton to the law firm of Gilbert, White and Gilbert at Santa Fe, and after a conference with Mr. Carl Gilbert of that firm, Pendleton employed Mr. Gilbert to represent him in all matters pertaining to the explosion. Later, with Pendleton's consent, appellee also employed Mr. Gilbert to represent it in the same matter. Six actions for damages resulting from the explosion were thereafter filed in state court naming Springer Gas as the defendant. Subsequently, Pendleton was joined as an additional defendant in these cases, and it was alleged that he was negligent in over-filling the gas tanks which supplied the distribution system and in improperly installing equipment in the building where the explosion occurred. As a matter of trial strategy, Mr. Gilbert concluded it would be beneficial to have separate counsel appear of record for Pendleton, and he so advised appellee. As a result, Mr. F. A. Catron of Santa Fe was employed by appellee to represent Pendleton. Catron and Gilbert worked together in the investigation work and other preparation for trial of the cases. The six cases were consolidated for trial and the trial, without a jury, was commenced on March 23, 1959, in the state court at Raton, New Mexico. During the course of the trial, the evidence showed

Springer Gas Company to be the alter ego of Pendleton and the plaintiffs were permitted to orally amend their complaints by alleging that Springer Gas was the agent of Pendleton in the sale of gas to the individual customers. After nearly two weeks of trial settlement of the cases was made for an aggregate amount of $151,000.

At the outset of the settlement discussions appellee agreed to pay the full amount of liability on the $25,000 policy, and eventually agreed to pay an additional $20,000 provided Pendleton would release it from further liability on the larger policy. At this same time, Pendleton was advised by Gilbert and Catron that he should seek independent legal advice because of their representation of appellee. Pendleton sought such advice and decided the settlement of the six cases should be made but refused any suggestion that he release appellee from liability upon the large policy. The settlement was made with the insurer paying $25,000 of the judgment and Pendleton paying $126,000.

In effectuating the settlement agreement in the state court, Mr. Gilbert, representing the insurer, included in the journal entry of judgment a specific finding of fact intended to be favorable to the insurer and against the insured as to its liability upon the insurance policy in question.[2] After the entry of the judgment, Pendleton, through his new retained counsel, attempted to have these findings stricken from the record, but Mr. Gilbert on behalf of the insurer, refused to agree to any such change in the journal entry. The record also shows that Mr. Catron, who was employed by the insurer to separately represent Pendleton personally, did nothing to protect Pendleton from the purported sting of this questioned finding.

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[2] "That it is not true that there was any negligence on the part of the said Raymond Pendleton, d/b/a Pendleton Oil and Gas Company, in the filling of the tanks of the defendant, Springer Gas Company, Inc., or otherwise except as hereinbefore specified."

[APPENDIX]

As an additional factual matter, it should also be noted that the correspondence in the record between Mr. Gilbert and appellee clearly reflects that from the inception of Mr. Gilbert's employment by the insurer until the eve of the state court trial, an uncertainty existed, on the part of both Mr. Gilbert and the insurer, as to the exact coverage afforded Pendleton by the policy in question.

This action resulted from the insurer's refusal to assume liability for payment of the entire judgment under the terms of the $100,000 - $300,000 policy. The appellant contends that appellee assumed the defense of the state court suits and completely controlled and directed such defense up to the eve of settlement, all without a reservation of rights agreement or other disclaimer of liability, and therefore it has waived its defense of noncoverage and is now estopped to deny liability. Appellee contends it did nothing that would amount to a waiver or an estoppel.

The findings of fact made below are very brief and may be summarized as follows: The plaintiff-appellant, at all times, was aware of the fact that the policy did not cover the gas distribution system; the explosion was caused by a defect in the distribution system; the policy was in the plaintiff's possession and he had a duty to read and become acquainted with its terms; that the insurer committed no acts amounting to a waiver or an estoppel and did not mislead the plaintiff or other insured. It must be observed that these findings are, in the final analysis, either findings of ultimate facts, without supporting findings of basic facts, or conclusions of law. Nevertheless, the evidence is not in conflict and the basic facts necessary to a disposition of the case are not in dispute. We may therefore dispose of the controversy on the record before us.

At the outset, we think this case is controlled by the long established rule that a liability insurance carrier, which assumes and conducts the defense of an action

brought against its insured with knowledge of a ground of forfeiture or noncoverage under the policy, and without disclaiming liability or giving notice of a reservation of its right to deny coverage, is thereafter precluded in an action upon the policy from setting up the ground of forfeiture or non-coverage as a defense. In other words, the insurer's unconditional defense of an action brought against its insured constitutes a waiver of the terms of the policy and an estoppel of the insurer to assert the defense of non-coverage. New Jersey Fidelity & Plate Glass Ins. Co. v. McGillis, 10 Cir., 42 F. 2d 789; Schmidt v. National Auto. & Cas. Ins. Co., 8 Cir., 207 F. 2d 301; General Tire Co. v. Standard Acc. Ins. Co., 8 Cir., 65 F. 2d 237; Claverie v. American Casualty Co. of Reading, Pa., 4 Cir., 76 F. 2d 570, cert. denied, 296 U.S. 590; 29A Am. Jur., Insurance, § 1465, p.p. 577-579; 45 C.J.S., Insurance, § 714, p.p. 684-690; Annot's. 81 A.L.R. 1326 and 38 A.L.R. 2d 1148. Judge Breitenstein, speaking for this Court, in Harbin v. Assurance Company of America, 308 F. 2d 748, 749, recognized the difficult position an insurer sometimes finds itself in, in undertaking the defense of an action brought against its insured, and said:

> "In such circumstances the control of the defense by the insurer carries with it the potential of prejudice to the insureds and the assumption of such control without a reservation of right to deny liability would have obligated the insurer to pay within the policy limits if the plaintiff should succeed."

Indeed, by the weight of authority, it is not necessary for the insured to show prejudice in such a situation because he is presumed to have been prejudiced by virtue of the insurer's assumption of the defense. Schmidt v. National Auto. & Cas. Co., supra; General Tire Co. v. Standard Acc. Ins. Co., supra; 45 C.J.S., Insurance, § 714, p. 689; 29A Am. Jur., Insurance, § 1466, p. 579.

—x—

[APPENDIX]

In the case of Traders & General Ins. Co. v. Rudco Oil & Gas Co., 10 Cir. 129 F. 2d 621, Judge Murrah speaking for this Court said, at page 627:

> "* * * The right to control the litigation in all of its aspects carries with it the correlative duty to exercise diligence, intelligence, good faith, honest and conscientious fidelity to the common interest of the parties. * * * When the insurer undertakes the defense of the claim or suit, it acts as the agent of its assured in virtue of the contract of insurance between the parties, and when a conflict of interest arises between the insurer, as agent, and assured, as principal, the insurer's conduct will be subject to closer scrutiny than that of the ordinary agent, because of his adverse interest * * *"

Appellee attempts to brush aside these legal principles with the assertion that it was obligated to defend the suits because of the allegations in the pleadings. We agree with appellee, that the duty of an insurer to defend is determined in the beginning of the litigation by the coverage afforded by the policy, as compared with the allegations of the complaint or petition filed against the insured. The duty to defend may also attach at some later stage of the litigation if the issues of the case are so changed or enlarged to come within the policy coverage. Harbin v. Assurance Company of America, supra. It may be conceded that at the outset of the litigation appellee was obligated to defend Springer Gas, the named insured in the policy with the smaller limits of liability. However, when Pendleton became a party defendant to the state court suits and it was alleged that he was negligent in over-filling the storage tanks which supplied the Springer distribution system, appellee apparently assumed it had an obligation under the questioned policy to defend Pendleton. With this we do not agree. The tanks were a part of the gas distribution system

and "all other operations usual and incidental to the operation" of the pipelines were excluded from coverage by the endorsement. It was also alleged that Pendleton was negligent in the installation of gas equipment in the building where the explosion occurred and this operation was likewise excluded from coverage by the endorsement. Then during the course of the state trial, liability on Pendleton was sought because the evidence conclusively showed Springer Gas to be his alter ego and thus making Pendleton personally liable because of the negligence of Springer Gas. Neither could this contention create an obligation on the insurer to defend, as Springer Gas' only business was the operation of the gas distribution system, which was in its entirety excluded. Giving the endorsement its full legal effect, as appellee wants us to do, it is clear that the insurer at no time had an obligation under the questioned policy to defend Pendleton, but it assumed that obligation, employed two lawyers to defend him and assumed full control of the litigation. It maintained this full control up to the time of settlement, when it, in effect, abandoned him. No reservation of rights or non-waiver agreement was entered into with Pendleton, who was a named insured in the policy in question but not in the Springer Gas policy. Appellee does not contend that a non-waiver or reservation of rights agreement existed but stresses the finding of the court below to the effect that Pendleton knew, or should have known, that he personally did not have coverage as to the distribution system because of the endorsement. Assuming this to be true, we do not believe it is controlling here. The insurer, after making a thorough investigation of the explosion and with full knowledge of the contents of the insurance policy, including the endorsements attached thereto, and of the charges of negligence against Pendleton in the state court suits, undertook to, and did, assume complete control of his defense in those suits. It did not at any time notify appellant that it was reserving the right to later

contest coverage and it made no attempt to make a non-waiver agreement with him. By this conduct of the insurer, appellant was induced to, and did, relinquish control of his defense in the suits to the insurer. Thus, this situation falls within the rule of estoppel by conduct as set forth in Porter v. Butte Farmers Mutual Insurance Company, 68 N.M. 175, 360 P.2d 372, where it was said:

> "Estoppel by conduct arises: Where a party has been induced by the conduct of another to do, or forbear doing, something he would not have, or would have, done but for such conduct; when disadvantage results from such forbearance or action. State ex rel. Fitzhugh v. City Council of City of Hot Springs, 56 N.M. 118, 241 P. 2d 100." (360 P. 2d at 376.)

Moreover, it has been held that the insurer's conduct in the type of situation we have here operates as an estoppel to later contest an action upon the policy even though the facts may have been within the knowledge of the insured equally as well as within the knowledge of the insurer. Tozer v. Ocean Accident & Guarantee Corp., 94 Minn. 478, 103 N.W. 509; Humes Const. Co. v. Philadelphia Casualty Co., 32 R.I. 246, 79 Atl. 1. We conclude that the insurer is estopped to now deny liability upon the insurance policy in question.

The basic facts of this controversy being undisputed in the record we must conclude that the ultimate facts or bare conclusions of fact found by the trial court which are inconsistent with the basic facts set forth herein are clearly erroneous.

REVERSED and REMANDED, with instructions to enter judgment for the plaintiff-appellant, as prayed for in his complaint.

JUDGMENT

Fourth Day, May Term, Thursday, May 16th, 1963.

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable Jean S. Breitenstein and Honorable Delmas C. Hill, Circuit Judges.

This cause comes on to be heard on the transcript of the record from the United States District Court for the District of New Mexico and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby reversed, that this cause be and the same is hereby remanded to the said district court with instructions to enter judgment for the plaintiff-appellant, as prayed for in his complaint, and that Raymond Pendleton, appellant, have and recover of and from Pan American Fire and Casualty Company, appellee, his costs herein and have execution therefor.

APPENDIX C

ORDER EXTENDING TIME TO FILE PETITION FOR REHEARING

Thirteenth Day, May Term, Monday, June 3rd, 1963.

Before Honorable Alfred P. Murrah, Chief Judge

On motion of appellee, it is now here ordered that the time within which appellee may serve and file a petition for rehearing in this cause is hereby extended to and including June 17, 1963.

[APPENDIX]

ORDER FURTHER EXTENDING TIME FOR FILING PETITION FOR REHEARING.

Nineteenth Day, May Term, Monday, June 17th, 1963

Before Honorable Alfred P. Murrah, Chief Judge

On application of appellee, it is now here ordered that the time within which appellee may serve and file a petition for rehearing in this cause is hereby extended an additional ten days from today.

APPENDIX D

AMENDMENT V TO THE UNITED STATES CONSTITUTION

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

APPENDIX E

AMENDMENT XIV TO THE UNITED STATES CONSTITUTION

". . . Nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

APPENDIX F

RULE 52 OF THE FEDERAL RULES OF CIVIL PROCEDURE, 28 U. S. C. A.

"Rule 52. Findings by the Court

"(a) Effect. In all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses . . ."

See also Amendments to Rules of Civil Procedure for the United States District Courts adopted by the Supreme Court of the United States, January 21, 1963, 31 F. R. D. 1 at page 17.

APPENDIX G

RULE 19 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES, ADOPTED APRIL 12, 1954, EFFECTIVE JULY 1, 1954

PART V. JURISDICTION ON WRIT OF CERTIORARI

19.

CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI.

"1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered.

* * * * * *

"(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; * * * or has decided a federal question in a way in conflict with applicable decisions of this court; * * *"

APPENDIX H

ORDER DENYING PETITION FOR REHEARING

Eleventh Day, June Term, Tuesday, July 16th, 1963.

Before Honorable Alfred P. Murrah, Chief Judge, Honorable Jean S. Breitenstein and Honorable Delmas C. Hill, Circuit Judges

This cause came on to be heard on the petition of appellee for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

(By order of July 26, 1963, the mandate of the United States Court of Appeals was stayed to August 25, 1963, under provision of paragraph 3 of rule 28 of said court).

ADDENDUM

Whether the Court of Appeals may refuse to apply the provisions of Rule 52(a) of the Federal Rules of Civil Procedure by pronouncing in its opinion that the findings of fact and conclusions of law of the trial court (together with the additional implied ultimate findings of fact and conclusions of law that must be read and considered in support of the trial court's findings of fact and conclusions of law, which must be presumed by the Court of Appeals to be likewise found and considered in support of the trial court's judgment as evidentiary and not ultimate findings of fact and conclusions of law of the trial court, to completely and entirely disregard same on appeal and permit the Court of Appeals to substitute its own alleged ultimate findings of fact and conclusions of law for those of the trial court so as to support its reversal and rendition of the trial court's judgment for the defendant by substituting in the Court of Appeals its new judgment for the plaintiff by merely saying that the controlling facts are undisputed in the record (which is not only vehemently denied and disputed, but actively controverted); and thereupon holding that its application of the law to such alleged undisputed controlling facts justifies their disregarding the trial court's findings of fact and conclusions of law and judgment thereon and reversing the trial court's judgment and rendering judgment in the Court of Appeals for the plaintiff, without any necessity for reversing and remanding the case to the trial court for a full hearing of all the evidence on the newly stated theory of recovery (and legal liability) pronounced by the Court of Appeals, which theory of recovery was not the true basis upon which the case was tried and judgment rendered in the trial court.

BRIEF IN OPPOSITION TO PETITION FOR WRIT

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 404

PAN AMERICAN FIRE & CASUALTY COMPANY,
Petitioner,

VERSUS

RAYMOND PENDLETON,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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September, 1963

SANTA FE PRINTING CO., INC., SANTA FE, N. M.

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 404

PAN AMERICAN FIRE & CASUALTY COMPANY,
Petitioner

VERSUS

RAYMOND PENDLETON,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

STATEMENT OF THE CASE

judicial to respondent with respect to his claims against petitioner. Respondent attempted to have a new judgment entered which would not be prejudicial but petitioner refused to consent to this (Pl. Ex. J, R 88, 135-137) on the grounds that petitioner's attorney Gilbert thought petitioner was entitled to it for its protection. (Pl. Ex. T, 118, 162)

Immediately before the settlement the petitioner offered to pay an additional $20,000.00 if respondent would relinquish any claims under the larger policy, having previously denied that the policy afforded coverage. (R 39)

ARGUMENT

Point I.

NEITHER PETITIONER'S RIGHT TO CONTRACT NOR THE DUE PROCESS CLAUSE OF THE CONSTITUTION WERE VIOLATED AND PETITIONER BY ITS CONDUCT WAIVED ANY CONSTITUTIONAL RIGHTS IT MAY HAVE HAD AS WELL AS WAIVING AND ESTOPPING ITSELF FROM RELYING ON THE DEFENSE OF NONCOVERAGE UNDER THE POLICY OF INSURANCE.

ing notice of its reservation of rights it is thereafter precluded in an action upon the policy from setting up such ground of forfeiture or noncoverage. In other words the insurer's unconditional defense of an action brought against its insured constitutes a waiver of the terms of the policy and an estoppel of the insurer to assert such grounds."

Comprehensive annotations with many cases cited therein clearly support the foregoing rule.

Neither the cases cited in the text of petitioner's brief nor in its footnotes are in point. A reading of those cases discloses that only one of them involved waiver or estoppel through an assumption of the defense, but all others are concerned with declaratory judgment actions, actions on life, accident and liability insurance policies where the insurer either refused to defend or to pay judgments or claims or other similar circumstances and none of them involve assumption of the defense by the insurer. Hence they are in no way analagous to the case at bar.

We find that where the question of estoppel or waiver by assumption of the defense of a case has been presented all circuits passing upon the question have held coverage could be extended by estoppel and that this court has denied certiorari in several of those cases.

Annot. 81 A.L.R. 1326, 38 A.L.R. 2d 1348

Stevens v. Continental Casualty Co. (8th Cir. 1942) 132 F.2d. 92; General Fire Co. v. Standard Accident Ins. Co. (8th. Cir. 1938) 95 F. 2d 237; Athletic Lieutenant Corp. v. Continental Ins. Co. (2nd Cir. 1943) 135 F.2d 248 Certiorari Denied 296 U.S. 590, 80 L. Ed. 417, 56

Nor do we find any circuit court decisions to the contrary with the exception of one Arkansas case which was based solely upon the law of Arkansas which will be hereinafter discussed.

In other cases cited by the petitioner at pages 10 and 11 of its brief the question of the effect of assumption of the defense in the absence of a non-waiver or reservation of rights agreement was not present. It is interesting to note that most of the same courts referred to by petitioner have been called upon to pass upon the precise point in question and have reached identical conclusions as the Texas Court of Appeals in the case at bar and contrary to those in the cited cases.

With respect to the case of *Standard Accident Insurance Company v. Roberts*, 152 F.2d 794 (8th Cir. 1946) arising in Arkansas which is the only case so principally relied upon by the petitioner, we direct the court's attention to the fact that the decision was based upon dictum contained in another Arkansas decision which the court felt to be contrary to an earlier decision holding the insurer estopped to assume the defense. It was the law of Arkansas, as clearly as the language

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In a later Eighth Circuit case arising in Missouri the court

held contrary to the *Roberts* case in *Schmidt et al. v. National Auto. & Cas. Ins. Co.*, 207 F.2d 301, as it had done in the earlier cases of *Meyers v. Continental Casualty Co.*, 12 F.2d 52, and *General Tire Co. v. Standard Ins. Co.*, 65 F.2d 237. Moreover, the Arkansas decision upon which the opinion in the Roberts case was based did not involve estoppel by assumption of the defense.

The Roberts case was soundly, and we believe appropriately, criticized in *Forgsgren v. Gilliot*, 110 F.S. 647 (U.S.D.C. W.D. Ark.)

State Farm Mutual Automobile Insurance Company v. Peters, 261 F.2d 331 (10th. Cir. 1958), is not inconsistent with the decision in the case at bar. It involved statements made by an insurance agent and an alleged promissory estoppel which the court pointed out did not induce or preclude any action by the insured. In the case at bar the insured surrendered the defense of the action to the insurance company attorneys (R 34, 35, 37, 40, 41) and counsel in the settlement negotiations and preparation of the judgment sought to protect the insurance company as opposed to the interests of the insured, even to the extent of refusing to permit modification of the judgment after respondent employed his own counsel. (P. Ex. F, R 110 to 122, 124) During the course of the trial counsel refused to advise respondent of his rights under the policy. (R 36, 37)

The decision of *Meyers v. Continental Casualty Co., supra*, was at a time when the present Tenth Circuit was a part of the Eighth Circuit and Judge Phillips, now of the Tenth Circuit Court, held:

"Where a liability insurance company which has issued a policy to indemnify an employer from loss from liability imposed by law on account of injuries suffered by his employees, under the terms of the policy either takes control and dominion of an action for damages brought by an injured employee against the insured or keeps control and dominion after full knowledge of the ground of liability, without giving seasonable notice to the insured that it does not consider itself liable under the policy, it is thereby estopped to deny its liability. (Citing cases)".

The rule was again recognized by the Tenth Circuit in *Harbor v. Insurance Company of America*, 308 F.2d 740 (1962), wherein the court stated:

"In such circumstances the control of the defense of the insurer carries with it the potential of prejudice to the insureds and the assumption of such control without a reservation of the right to deny liability would have obligated the insurer to pay within the policy limits if the plaintiff should succeed."

Ibid. at 749

If the law were as contended by petitioner, there would be no such thing as estoppel by conduct in matters relating to contracts.

The law seems well settled that a party may waive or be estopped to assert constitutional rights. The rule is stated in 11 Am. Jur. 765 as follows:

See also 16 C.J.S. 263 et seq. Stoutenburgh v. Hennick, 194 U.S. 262, 48 L.Ed. 1115, 24 S.Ct. 737; Pacific Gas & Elec. Co. v. Police Court, 251 U.S. 22, 64 L.Ed. 455, 42 S.Ct. 449; Johnson et al. v. [illegible] et al., 10th Cir. 1933, 68 F.2d 506.

With certain exceptions an individual may waive constitutional provisions intended for his benefit, especially where no question of public policy or public morals is involved. Such waiver may be in writing or by conduct amounting to an estoppel. It seems that constitutional provisions intended to protect property may in all instances thus be waived."

Petitioner did not raise the question of the Due Process Clause of the Fifth Amendment in either the trial court or the Court of Appeals. There is nothing in the decision of the Court of Appeals (317 F.2d 96) to show presentation of the question there and the Findings of Fact and Conclusions of Law of the trial court (R 15 & 16) clearly demonstrate that this question was not an issue in the trial court. In addition petitioner's answer discloses this proposition was not raised therein as either an affirmative or legal defense (R 5-7). Under these circumstances petitioner is at this stage of the proceedings precluded from raising the question for the first time.

Point II

THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH THE DECISIONS OF THE HIGHEST STATE COURT OF NEW MEXICO WITH RESPECT TO THE APPLICATION OF THE DOCTRINE OF WAIVER AND ESTOPPEL.

As hereinbefore pointed out, petitioner's attorneys assumed control of the defense and respondent was definitely

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14 Cyc. of Fed. Procedure 3rd Ed. 120 Sec. 67.09 and cases cited therein.

prejudiced by their failure to advise him as to his rights under the policy, by insertion of prejudicial findings in the judgment of the state court and their refusal to permit a modification of that judgment.

New Mexico has never passed upon the question of presumption of prejudice through the assumption of the defense in a case such as this. Hence the Circuit Court was at liberty to make that presumption, but it did not do so. The decision found respondent was prejudiced by the failure of petitioner's counsel to protect him from the sting of the prejudicial finding (317 F.2d 98), that relinquishment of control by respondent was prejudicial (317 F.2d 100) and that it had maintained control of the litigation to the time of settlement when it in effect abandoned respondent. (317 F.2d 100) Hence petitioner cannot properly argue, as it has attempted to do, that the Circuit Court presumed prejudice. After pointing out these prejudicial matters, and only then, did the Court of Appeals make the statement that by the weight of authority prejudice could be presumed.

Petitioner cites but two cases, neither of which are in point since they did not involve assumption of the defense by the insurer. *Porter v. Butte Farmers Mutual Insurance Co.*, 360 P.2d 472 (N.M. 1961), wherein applications for hail insurance for the crop year 1957 had no expiration date, but policies were issued with an expiration date of October 1, 1957.

Thereafter plaintiffs suffered a hail loss and the insurer denied liability, plaintiffs claiming the agent represented that the insurance was for the crop year. Thus this was not a case

bottomed upon assumption of the defense. The court held there was no estoppel, saying:

> "Estoppel by conduct arises: Where a party has been inducted by the conduct of another to do, or forbear doing, something he would not have, or would have, done but for such conduct; when disadvantage results from such forbearance or action. State ex rel. Fitzhugh v. City Council of City of Hot Springs, 56 N.M. 118, 241 P.2d 100."

As pointed out by the Circuit Court in its opinion (317 F.2d 100), there was prejudice to respondent and estoppel by conduct on the part of petitioner under the *Porter* case, *supra*. Hence it cannot be said that the decision conflicted with the decisions of New Mexico.

The other New Mexico case cited by petitioner is *Patten v. Santa Fe National Life Ins. Co.*, 139 P.2d 1019 (N.M. 1943), which again did not involve assumption of the defense.

Even if respondent was aware of the exclusion and lack of coverage, petitioner is nonetheless estopped to deny coverage.

Town v. Ocean Accident & Guarantee Corp., 94 Minn. 478, 103 N.W. 500; Home Const. Co. v. Lindadelphia Casualty Co., 31 R.I. 246, 79 A. 1; General Tire Co. of Minneapolis v. Standard Acc. Ins. Co., supra; 30 A.L.R. 2d 1260.

Point III

THE COURT OF APPEALS DID NOT ERR IN DETERMINING THAT THE FINDINGS AND CONCLUSIONS OF THE TRIAL COURT WERE CLEARLY ERRONEOUS UNDER RULE 52(a).

The Circuit Court declared the Findings of Fact and Conclusions of Law to be clearly erroneous because the basic facts upon which the decision must rest were not in dispute. Under the cases set forth in Point I herein the necessary basic facts precluding the petitioner from denying coverage are as follows:

(a) Assumption of the defense of the action without

(b) a non-waiver or reservation of rights agreement and

(c) prejudice to the insured. This was supported by the facts hereinbefore referred to which under the majority rule may be presumed through the assumption of the defense and the insurer's control of it.

These basic facts are undisputed and from them the only conclusion of law that can be drawn is that petitioner by its conduct is estopped to deny coverage under its policy.

With these basic facts in mind an examination of the pertinent findings and conclusions of the trial court show that they are clearly erroneous.

Stated very generally, the pertinent findings of the trial court were that respondent was aware of the lack of coverage

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34 A.L.R.2d 1148; 31 A.L.R. 1326.

and that the cause of the explosion came under an excluded risk, that there were no act of estoppel or waiver. (R 14, 15) As pointed out above, knowledge on the part of respondent of lack of coverage is immaterial in the face of the assumption of the defense. Under the decisions, the assumption of the defense constituted an act of estoppel or waiver, and particularly so since prejudice was present, thus making it immaterial whether the cause of the explosion was an excluded risk or not.

Finding of Fact 9 "That there were no acts committed or performed on the part of the defendant that would be a waiver or estoppel" is merely a conclusion of law and could be properly disregarded.[2] Stated generally, the trial court's conclusions of law (R 15) were that there was no waiver or estoppel. This was clearly erroneous as the assumption of the defense and prejudice to respondent, actual or presumed, constituted estoppel or waiver as a matter of law. The court also concluded in effect that the cause of the explosion came within the policy exclusions. Again, this is wholly immaterial and irrelevant in the face of the basic facts, for by virtue of them petitioner is estopped to deny coverage.

Although in view of the foregoing we deem it unnecessary, we wish to point out that, contrary to opposing counsel's statement, Mr. Pendleton was not referred to Mr. Gilbert by Mr. Sheehan but by petitioner's agent (R 30) and that Mr. Gilbert was not sure of the statement when he made it (R 61), stating "As I recall."

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[2] See Fed. Procedure 3rd Ed. 26 (1963 Pocket Parts, p. 79).

RESPONSE TO ADDENDUM

This addendum is a one full printed page single sentence with parentheses within parentheses which makes it difficult to understand. However, we believe we have answered all questions that it may have intended to raise in the body of our brief.

CONCLUSION

We submit that none of petitioner's points are supported in law and that to sustain them would be to overturn previous action by this court and a majority of the circuit courts and would be contrary to decisions of the Supreme Court of New Mexico.

Therefore, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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